MOTION FILED
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No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,
AND
UNIVERSITY OF MARYLAND,
PETITIONERS,
V.
JUAN CARLOS MORENO, ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN COUNCIL ON EDUCATION, THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, AND THE AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES AS *AMICI CURIAE*

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The American Council on Education (ACE), the National Association of State Universities and Land-Grant Colleges

(NASULGC), the American Association of State Colleges and Universities (AASCU), and the American Association of Community and Junior Colleges (AACJC), by their undersigned attorney, move pursuant to Rules 36.1 and 42 for leave of Court to file a brief as *amici curiae* in the above-referenced case. In support of this motion, we state:

1. ACE, NASULGC, AASCU, and AACJC are nonprofit membership associations organized under the laws of and located in the District of Columbia.

2. Founded in 1918, ACE is a voluntary membership organization composed of 1380 nonprofit institutions of higher education and 177 educational associations and organizations. NASULGC's 140 member institutions are among the largest colleges, universities, and complex multi-campus systems in public higher education in the nation. Established in 1961, AASCU represents 345 State-assisted four-year colleges and universities and enrolls one-third of the nation's baccalaureate students. AACJC is a nonprofit corporation with a membership of over 900 of the country's community and junior colleges, including both publicly and independently-supported institutions.

3. ACE is the nation's major coordinating body in postsecondary education. NASULGC's mission is to promote the contributions that State and land-grant institutions make to postsecondary education through teaching, research and extension programs. AASCU is the mechanism through which State colleges and universities work collectively to formulate policy. AACJC's purpose is to provide national leadership in support of community-based higher education. As organizations whose members include the overwhelming majority of two and four-year publicly-supported colleges and universities, we are uniquely able to represent the interests of higher education generally on matters of national importance, such as the case pending before this Court.

4. At this time of drastic budget-cutting and retrenchment, following chronic inflation and recession, institutions of higher education face a series of increasingly-acute financial crises. In order to provide effective postsecondary educational programs in times of dwindling governmental support, higher tuition and fees will undoubtedly be required. Public institutions, in particular, must meet a special challenge because of their historical dependence on support from State and local income tax revenues. Thus, we believe that it is essential to preserve rational systems of according preferential tuition rates, fees, and admission to in-state students such as the residency policies in effect at the University of Maryland and most other public postsecondary institutions in the United States.

5. After certiorari was granted in this case in 1977 on a single constitutional question (the continued validity of *Vlandis* v. *Kline*, 412 U.S. 441 (1973)), ACE and 28 States joined as *amici curiae* in support of the University of Maryland in urging that *Vlandis* be overruled. In its current posture, this case presents not only the constitutional question the Court did not answer when it last considered the case, but also three other constitutional issues that are of great concern to the national higher education community. As *amici curiae* comprising the principal associations of colleges and universities in the United States, we are able to offer a special perspective on the importance of these constitutional issues being decided by this Court, and on their proper resolution.

6. Although the parties consented to ACE appearing as an *amicus curiae* when the case was previously before the Court, both on petition for certiorari and the merits, the respondents' counsel has now refused consent, implying that the Court might attach undue importance to the case if consent were granted. Nevertheless, as evidenced by the present motion on behalf of ACE and the other leading associations of colleges and universities, as well as by the current *amici curiae* brief of over forty States, this case raises issues of transcendent

importance. They are issues to which we urge we are especially qualified to speak.

7. The written consent of counsel for the petitioners to our filing a brief as *amici curiae* has been lodged with the Clerk of the Court.

Wherefore, we urge that the Court grant this motion for leave to file the accompanying brief as *amici curiae* in this case.

Respectfully submitted,

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AND
THE AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES
AS *AMICI CURIAE*

INTERESTS OF THE *AMICI CURIAE*

The *amici curiae* are the principal associations of colleges and universities in the United States. Our member institutions comprise the overwhelming majority of publicly-supported colleges and universities in the nation.

The American Council on Education, founded in 1918, is the nation's largest association of colleges and universities. Its membership includes 1,380 institutions of higher education, 177 national and regional associations, and 61 affiliated institutions and organizations concerned with higher education in the United States. The Council, through voluntary and cooperative action, seeks to provide comprehensive leadership for improving educational standards, policies, and procedures.

The National Association of State Universities and Land-Grant Colleges is an organization representing public institutions that are among the largest colleges, universities, and complex multi-campus systems of higher education in the United States. Its 140 member institutions include land-grant colleges and universities, state universities, urban universities, and major campuses of multi-campus universities. The sector of higher education represented by the Association grants 38% of all degrees awarded in the United States, including 36% of all bachelors, 39% of all first professional, 42% of all masters, and 64% of all doctorate degrees.

The American Association of State Colleges and Universities is an organization consisting of 345 member colleges and universities and their presidents or chancellors together with 34 associate members who are chancellors, executive directors, or heads of boards of trustees of state college systems. It was organized in 1961, and its member institutions have a total enrollment in excess of 2,500,000.

The American Association of Community and Junior Colleges was organized in 1920. Its membership of more than 900 institutions comprises a majority of the country's community and junior colleges, including both publicly and independently supported institutions, which enroll almost 5,000,000 students.

As *amici curiae*, we write to demonstrate our vital concern for the fiscal integrity of public colleges and universities. At this time of drastic budget cutting and retrenchment, following chronic inflation and recession, institutions of higher education face a series of increasingly-acute financial crises. In order to provide effective post-secondary educational programs in times of dwindling governmental support, higher tuition and fees will undoubtedly be required. Public institutions, in particular, must meet a special challenge because of their historical dependence on support from State and local income tax revenues. Thus, we believe that it is essential to preserve rational systems of according preferential tuition rates, fees, and admission to in-state students such as the residency policies in effect at the University of Maryland and most other public post-secondary institutions in the United States.

ARGUMENT

THIS COURT SHOULD REVIEW THE FOURTH CIRCUIT'S DECISION, UPHOLD THE UNIVERSITY OF MARYLAND'S IN-STATE POLICY, AND OVERRULE *VLANDIS* v. *KLINE*.

This case raises issues of great importance to public colleges and universities across the nation. The difference between in-state and out-of-state tuition and fees represents a vital source of income to these institutions, especially in this time of decreasing governmental resources to fund public higher education. Almost ten years ago, the additional income derived from out-of-state tuition and fees was estimated at $250 to $300 million annually for the 400 public colleges and universities belonging to the National Association of State Universities and Land-Grant Colleges and the American Association of State Colleges and Universities. Waugh, *Is OUt-of-State Tuition Legal?*, 4 Change 22 (Winter 1972-73). Time, inflation, and an ailing economy have obviously heightened dependence on this important source of revenue.

The in-state policy of the University of Maryland, in common with the tuition policies of most public colleges and

universities, seeks to equalize educational costs by assigning in-state or out-of-state status (with appropriately differential tuition rates and fees) to its students. The University's method for achieving cost equalization is also like that of most public colleges and universities in the nation. Only United States citizens and permanent resident aliens are eligible for in-state status, *see, e.g. Kirk* v. *Board of Regents of University of California,* 273 Cal. App. 2d 430, 436 n. 5, 78 Cal. Rptr. 260, 263-64 n. 5 (1969), *appeal dismissed,* 396 U.S. 554 (1970), because as a class nonimmigrants, due to their limited stay in this country or their exemption from income taxation, do not make full contributions to the cost of public higher education as do citizens and permanent resident aliens who are domiciled in the State. Similarly, in the case of financially dependent students, their domicile is irrelevant. Instead, the University looks to the parent or spouse who "pays the freight" to see if this person is a citizen or permanent resident alien domiciled in the State who should be accorded preferential in-state status. When the Armed Forces of the United States assigns one of its members to attend the University for educational purposes, the University assumes the Treasury's ability to pay out-of-state tuition and fee differentials and does not inquire into the individual student's domicile. Finally, when financially independent students who are citizens or permanent resident aliens are involved, their domicile in the State is the key to in-state status because they are subject to the full range of State taxation, including the State income tax so vital to the University's continued existence.

The decision of the court of appeals, *Moreno* v. *University of Maryland,* 645 F.2d 217 (4th Cir. 1981), *aff'g Moreno* v. *Toll,* 489 F. Supp. 658 (D. Md. 1980), and *Moreno* v. *Toll,* 480 F. Supp. 1116 (D. Md. 1979), if allowed to stand, will cast doubt on the rational in-state policies of public colleges and universities in all parts of the country. Its reliance on *Vlandis* v. *Kline,* 412 U.S. 441 (1973), and the discredited irrebuttable presumption doctrine for the result is all the more alarming.

Weinberger v. *Salfi*, 422 U.S. 749, 772 (1975), recognized the danger of the *Vlandis* analysis, correctly terming it "a virtual engine of destruction for countless legislative judgments." On no occasion since has this Court employed the irrebuttable presumption doctrine to invalidate a rationally-based classification not implicating a fundamental right. Nevertheless, as the reliance on *Vlandis* below demonstrates, a clearer message is required. *Vlandis* v. *Kline* should be overruled.

Another disturbing characteristic of the Fourth Circuit's affirmance is its embracing the application of the suspect classification, strict scrutiny equal protection standard to nonimmigrant aliens. This strikes not only at the heart of most in-state policies but also conflicts with the complementary policy of the United States Department of Education, which denies nonimmigrants low interest federal, state, and private student loans. 45 C.F.R. § 177.201 (1980).

Nonimmigrants as a class do not support public higher education in the same measure as citizens and permanent resident aliens. As a group, the contributions of nonimmigrants to State income tax revenues are minimal compared to their citizen and permanent resident alien counterparts. Unlike citizens and permanent resident aliens, nonimmigrants are exempt from income taxation on their worldwide income. 26 U.S.C. § 872 (1976). More importantly, many nonimmigrants are exempt from federal and State taxation on their salaries from foreign governments and international organizations — their principal or exclusive sources of incomes — and most other nonimmigrants do not remain in the United States long enough to be significant contributors to the State income tax revenues that support public higher education.

For these reasons, nonimmigrant aliens should not have been accorded suspect class standing to invalidate rational in-state policies. Instead, rational basis analysis, applied in

Starns v. *Malkerson*, 326 F. Supp. 234, 239 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971) (*mem.*), to uphold the University of Minnesota's residency policy, should have been found equally applicable here to uphold the University of Maryland's in-state policy. As noted by Justice Rehnquist, dissenting from the certification of a question of State law in *Elkins* v. *Moreno*, 435 U.S. 647, 669, 675 (1978):

> [T]he University of Maryland's classification policy
>
> > "does not purport to speak in terms of the bona fides of [domicile] but then make plainly relevant evidence of such bona fides inadmissible. As in *Starns v. Malkerson*, 326 F. Supp. 234 (Minn. 1970), summarily aff'd, 401 U.S. 985 (1971), the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in *Starns*, [respondents] are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test." Id., [*Weinberger* v. *Salfi*, 422 U.S. 749] at 772 [(1975)].

If allowed to stand, the decision of the court of appeals threatens to imperil the fiscal integrity of public colleges and universities by making in-state tuition rates and fees available to *all* nonimmigrants, including those on student visas. *See Lok* v. *INS*, 548 F.2d 37, 40 (2d Cir. 1977) ("[I]t is possible for aliens to possess a lawful domicile in this country without being admitted for permanent residence, *see, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (student)."). Until the present case, no court had ever suggested that the cost-equalization rationale for according differential in-state and out-of-state tuition rates and fees could be so simplistically and devastatingly subverted.

As *amici curiae,* we urge the Court to grant certiorari in this case to uphold the rational system of classification imposed by the University of Maryland. The consequences of striking down the classification may ultimately force publicly-supported colleges and universities to charge the same rate of tuition to all, regardless of their contributions to the costs of higher education. This would deprive State income taxpayers of the direct benefit of their support by raising the cost of education for them and their dependent children. It might require increasing the State income tax burden because revenues provided by a uniform tuition rate at present levels would fail to meet a reasonable proportion of an institution's operating costs. In addition, if tuition rates are made uniform at a higher level, needy State residents might be precluded from any higher education because of the higher cost.

We also seek to preserve an open enrollment policy among publicly-supported colleges and universities in order to promote a heterogeneous student body. Judicial elimination of a reasonable system of tuition and fee differentials may eliminate this diversity by provoking "the natural response of States which, having placed high value on universities, having developed great institutions at large cost, believe that other States should do the same and therefore seek ways to keep the institution in being for its own citizens." *Vlandis* v. *Kline,* 412 U.S. 441, 463 (1973) (Burger, C.J. dissenting).

Finally, we seek continuation of this Court's recognition of "[t]he State's objective of cost equalization." *Vlandis* v. *Kline,* 412 U.S. at 448. We urge the Court to facilitate this objective by upholding the right of publicly-supported institutions of higher education to classify students, including nonimmigrants, in ways reasonably calculated to achieve this goal.

CONCLUSION

As illustrated by this case, *Vlandis* v. *Kline* continues to be employed and rational in-state policies continue to be questioned. When discarded due process doctrines can be brought back to life and new equal protection analyses created to obscure the cost-equalization *raison d'etre* of in-state/out-of-state tuition and fee policies — and to imperil these policies in the process — it is time for this Court to act. For these reasons, we urge that a writ of certiorari issue in this case, that the Court reverse the judgments of the district court and court of appeals and uphold the University of Maryland's in-state policy, and that *Vlandis* v. *Kline* be overruled.

Respectfully submitted,

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